No. 13,224

IN THE

United States Court of Appeals

For the Ninth Circuit

LYLE WOOLLOMES,

Appellant,

vs.

ROBERT A. HEINZE, Warden of the California State Prison at Folsom,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

On August 2, 1951, Lyle Woollomes filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division (R. 1). On August 8, the Court issued an order to show cause (R. 47). The State of California filed a return to the order to show cause and a motion to dismiss (R. 66, 48). Judge Carter dismissed the petition (R. 79). A certificate of probable cause was granted and the appellant appeals *in forma pauperis* (R. 90, 91).

STATEMENT OF THE FACTS.

The history of the *Woollomes* case goes back to February 23, 1938. A little after midnight on that day two men held up the Burp Hollow Cafe in Los Angeles and killed the proprietor. Woollomes and a man named Lariscy were convicted of the robbery and murder. The death sentence was imposed and the California Supreme Court affirmed the conviction.

People v. Lariscy, 14 Cal. (2d) 30, 92 Pac. (2d) 638.

One of the points argued to the California Supreme Court concerned the sufficiency of the evidence identifying Woollomes as the man who committed the crime. The Court held that the identification was sufficient.

Subsequent to the conviction Governor Olsen commuted Woollomes' sentence to life imprisonment (R. 68). The basis of the commutation was the affidavits of several eye witnesses to the crime who had not been called at the trial. These affidavits were to the effect that Woollomes was not the man involved (R. 68).

This was in April 1940.

In 1950 Woollomes petitioned the California Supreme Court for habeas corpus. The petition was denied without opinion. The United States Supreme Court denied certiorari.

On August 2, 1951, Woollomes filed his present petition in the United States District Court for the Northern District of California, Northern Division (R. 1).

The facts alleged in the petition are the following:

(1) After the conviction it was discovered that seven eye witnesses to the crime had not been called by the prosecution (R. 5).

(2) These witnesses were interrogated and signed affidavits that in their opinion Woollomes was not the man who committed the crime (R. 12-31).

(3) The affidavits were presented to the trial jurors who then signed affidavits that if this evidence had been produced they would have voted for an acquittal (R. 5, 31-43).

(4) Prior to the trial some of Woollomes' friends, upon advice of counsel, demanded of the Police Department and the Coroner's office the names of all the witnesses to the crime, but the police officials did not disclose the names of these witnesses (R. 6).

(5) These friends then went over the records in the Police Department and the Coroner's office and found only the names of the witnesses who had appeared at the preliminary hearing (R. 7).

(6) After the trial the friends again went to the Coroner's office and this time they found a list of ten or more other witnesses (R. 44).

(7) They complained to the District Attorney and he told them that it was not an unusual procedure to withhold the names of witnesses (R. 95).

An order to show cause was issued (R. 47). The State of California filed a return to the order to show cause setting out the judgment of conviction, commit-

ment, and commutation of sentence (R. 66). A motion to dismiss the petition on the ground that the petition failed to state a claim upon which relief could be granted was also filed (R. 48). The motion to dismiss was granted and Woollomes appeals (R. 79, 84).

APPELLANT'S ARGUMENT.

I. The conviction is invalid because the prosecution knowingly suppressed evidence which if presented would have resulted in an acquittal.

II. The appellant has exhausted his state remedies because he has petitioned the California Supreme Court for habeas corpus and the United States Supreme Court has denied certiorari.

SUMMARY OF APPELLEE'S ARGUMENT.

I. The appellant has not exhausted his state remedies as required by 28 U.S.C. 2254.

A. The appellant has not properly sought to invoke the corrective process of the State of California because his petition for habeas corpus to the California Supreme Court did not conform to the procedural requirements necessary for that Court to entertain the petition.

B. The appellant is required to submit a petition to the California Supreme Court which will comply with its procedural requirements because the federal

courts cannot speculate on what the California Court will do with a properly presented petition.

C. Even if the California Supreme Court had reached the merits and denied the appellant's petition for habeas corpus on the ground that too much time has elapsed, the appellant would still not have exhausted his state remedies since he had a remedy under the law of California at one time and failed to avail himself of it.

II. In any event the Federal District Court properly denied the petition because the petition did not allege facts which, if true, would show that the appellant had been denied any right under the United States Constitution.

ARGUMENT.

I. THE APPELLANT HAS NOT EXHAUSTED HIS STATE REMEDIES AS REQUIRED BY 28 U.S.C. 2254.

A. The appellant has not properly sought to invoke the corrective process of the State of California because his petition for habeas corpus to the California Supreme Court did not conform to the procedural requirements necessary for that Court to entertain the petition.

The State of California will afford relief to one whose conviction was secured by the knowing use by the prosecution of perjured testimony or the suppression by the prosecution of evidence material to the defense. *In re Mooney,* 10 Cal. (2d) 1, 73 P. (2d) 554; *Mooney v. Holohan* (1934), 294 U.S. 103. If a state prisoner by appropriate procedure presents such

an issue he will be given a hearing to determine the truth of his allegations. *In re Mooney, supra.* The appropriate procedure is by writ of habeas corpus. Until a prisoner has properly invoked this procedure and been denied relief he has not exhausted his State remedies and the Federal District Court in absence of special circumstances must not entertain his petition for habeas corpus. 28 U.S.C. 2254.

California has of necessity developed certain procedural requirements which must be followed if one is to obtain this relief by habeas corpus. For example, the petition must be verified (Calif. *Penal Code* 1474); it must set out all prior applications for the writ (Calif. *Penal Code* §1475); it must detail the facts on which a conclusionary allegation is based (*In re Swain* (1949), 34 Cal. (2d) 300, 302, 209 Pac. (2d) 793); and if it is a belated attack it must set forth some explanation for the delay (*In re Swain, supra,* 302, 304; *In re Razutis,* 35 Cal. (2d) 532, 536, 219 Pac. (2d) 15). If a petitioner does not comply with these procedural requirements he has not given the State of California a chance to afford him relief. What is more important here, California has in no sense denied him relief. Until California has denied him relief a Federal Court has no jurisdiction to entertain the petition in absence of special circumstances of extraordinary urgency.

Woollomes' petition to the Supreme Court of California failed to comply with these procedural requirements. The specific procedural requirement with

which he failed to comply is stated by the California Supreme Court in *In re Swain, supra,* p. 304.

> "We are entitled to and do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned *and that he fully disclose his reasons for delaying in the presentation of those facts.* This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.
>
> The application for the writ is denied without prejudice to the filing of a new petition which shall meet the requirements above specified." (Emphasis ours.)

An examination of the petition will disclose that all the facts relied on were known to the appellant and his attorneys in 1939. As a matter of fact they were used to secure the commutation of the death sentence. They were not then used to attack the judgment. And yet the petition does not offer or attempt to show any reason for the 12-year delay.

The appellant contends that the reason for the delay is obvious. His valid term for robbery expired in 1949 and in 1950 he started his attack on the invalid murder judgment. He argues that he could not attack the invalid term for murder until he had served the valid robbery term. He contends that this proposition is so well known that the California Su-

preme Court must have notice of it. Concededly such a proposition is well established. (*McNally v. Hill* (1934), 293 U.S. 131.) But the proposition can have no application here. The evidence allegedly suppressed by the prosecution would establish that the appellant was not present at the scene of the crime. If his murder conviction is void, of necessity his robbery conviction is also void. There is no reason why the appellant could not have attacked both convictions in 1940. Since there has been a delay of eleven years the appellant must under the California procedural rules undertake to explain the delay. Until he has submitted a petition that conforms to the procedural requirements he has not exhausted his state remedies. No exceptional circumstances are alleged to obviate the necessity for the exhaustion of state remedies. His petition was, therefore, properly dismissed.

In *Buchanan v. O'Brien* (1st Cir. 1950), 181 Fed. (2d) 601, the Court had before it a similar problem dealing with the procedural requirements of the law of Massachusetts. The District Court had dismissed the petition without a hearing or the issuance of an order to show cause. The petition on its face showed the denial of a constitutional right. The Court affirmed the dismissal on the ground that the petitioner had not exhausted his state remedies as required by 28 U.S.C. 2254. The proper procedure in Massachusetts to collaterally attack a judgment of conviction seemed to be a writ of error. The petitioner had attempted habeas corpus but was unsuccessful. The petitioner then sought the writ of error.

In accord with Massachusetts procedure the matter was examined by a single justice of the highest Court. This justice denied the writ apparently on the ground that there was no merit in the claim. In order to get a hearing on the matter by the entire bench it was necessary under Massachusetts law to comply with certain procedures among which was the giving of notice to the Attorney General of the filing of exceptions to the order of the single justice. The petitioner failed to comply with this procedural rule and the full bench was prevented from reaching the merits of his claim. The Court held that he had not exhausted his State remedies. In this case, as in the case at bar, failure to comply with the procedural requirements prevented the State Courts from giving an adjudication of the claim and hence the State remedies were not exhausted.

The Court of Appeals for the 8th Circuit had a similar problem dealing with the procedural requirements of Minnesota in *Willis v. Utecht* (8th Cir. 1950), 185 Fed. (2d) 210. The State Court was prevented from reaching the merits of the habeas corpus petition because of non-payment of filing fees by the petitioner and the Court of Appeals held that the appellant had not exhausted his State remedies.

The Federal Courts have had the same problem when dealing with the procedural law of Pennsylvania. In *U. S. ex rel. Calvin v. Cloudy* (D.C., Penn., 1951), 95 Fed. Supp. 732, the petitioner prior to his application in the Federal District Court had peti-

tioned the Supreme Court of Pennsylvania for habeas corpus. The petition was denied and the United States Supreme Court denied certiorari. The Federal Court held that the petitioner had not exhausted his State remedies since under Pennsylvania law the Supreme Court only considered applications for habeas corpus in unusual circumstances, the normal rule being that the application should be made to the lower Superior Courts of Pennsylvania and the proceeding should come to the Supreme Court on appeal. Since the petitioner had not complied with the normal procedural requirements, the Pennsylvania Supreme Court had not denied him relief and hence he had not exhausted his State remedies. Accord *U. S. ex rel. Frazier v. Commonwealth* (D.C., Penn., 1951), 97 Fed. Supp. 62.

The conclusion is inescapable that Woollomes has not properly sought to invoke the corrective process provided by the State of California and until he has done so the Federal Courts should not entertain his application for habeas corpus.

B. The appellant is required to submit a petition to the California Supreme Court which will comply with its procedural requirements because federal courts cannot speculate on what the California Court will do with a properly presented petition.

It may be argued by the appellant that there is no time limitation on the right of a prisoner, confined in violation of his constitutional rights, to seek federal habeas corpus. He may argue that the State of California by imposing such a time limitation does not allow a prisoner to present his constitutional claim

and thus affords no corrective process. But the simple answer to this argument is that the Federal Courts cannot indulge in the presumption that the Courts of California will ignore the constitutional rights of inmates in State penitentiaries. As a matter of fact the presumption is very strong the other way.

An indication of the length to which the presumption that constitutional guarantees will be observed in State Courts is carried lies in the United States Supreme Court's decision in *Woods v. Nierstheimer* (1945), 328 U.S. 211. The case dealt with the post-conviction corrective process of the State of Illinois.

The case was in the Supreme Court of the United States on certiorari to the Supreme Court of Illinois which had denied the petitioner's application for habeas corpus. At that time it seemed that the proper method to collaterally attack a judgment of conviction in Illinois was by writ of error *coram nobis*. There was a 5-year statutory limitation on such action. Woods alleged that this period had expired and that he could not secure relief by *coram nobis*. Yet in the face of the seemingly inexorable statutory bar the Supreme Court said:

> "But we do not know whether the state courts will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of constitutional guarantees where his action is brought more then five years after rendition of the judgment."

Relying on the reasoning of the *Woods* case the Court of Appeal for the Ninth Circuit in *Burton v.*

Smith (9th Cir. 1947), 162 Fed. (2d) 330, 333, refused to speculate on the potential inavailability of state corrective process. It was argued in that case that Washington did not provide adequate corrective process—that habeas corpus and *coram nobis* would not lie. The Court answered the argument thus:

> "It is not within the province of a federal court to predict what the holding of the state supreme court will be when 'the point is in actual controversy.' The mandate of the Supreme Court of the United States is that the *petitioner* by actual *attempt*—and not the federal court, by prognostication or ratiocination—shall exhaust all state remedies before applying to a federal tribunal for relief."

In *Hampton v. Smith* (9th Cir. 1947), 162 Fed. (2d) 334, 335, this circuit again discussed the apparent inavailability of post conviction corrective process in the State of Washington.

> "To make a showing of having exhausted state remedies, it is not sufficient for the seeker of federal relief to present a plausible argument that the state courts would probably not decide in his favor anyway. He must make an actual attempt to obtain redress in the state courts, and must prosecute that attempt in good faith."

In *Mason v. Smith* (9th Cir. 1947), 162 Fed. (2d) 336, 337, the Court affirmed the dismissal of a petition for habeas corpus on the ground that the State remedies had not been exhausted. The petitioner had sought *coram nobis* in the King County trial Court of the State of Washington. The petitioner did not re-

ceive notice of the denial of this writ until 13 days after the order. Under the rules on appeal for the Supreme Court of Washington a notice of appeal has to be filed within five days. Since that period had expired the petitioner again petitioned the lower Washington Court for *coram nobis*. The petition was denied on the basis that the first petition was *res judicata*. The Supreme Court of Washington affirmed. When the petitioner sought relief in the Federal Courts the Court held he had not exhausted his State remedies.

> "It will be observed that the appellant herein did not take an appeal from the adverse decision of the Superior Court of King County on his first petition for a writ of error coram nobis.
>
> "The fact that it was 'impossible for him to have served an [to] file a notice of appeal within five days as required by the rules governing appeals to the Supreme Court of Washington', does not excuse his non-action in the matter. He should have made the effort, and he must still make the effort, before he can successfully contend that he has exhausted all state remedies."

It is apparent from these cases that we are in no way concerned with the validity of any time limitation which may or may not be imposed by the California Court on the presentation of a constitutional claim. We do not know what the California Courts may or may not consider to be an adequate explanation for delay. But we do know that we cannot presume that California will ignore Woollomes' constitutional rights. He must properly present a petition and give the California Supreme Court a chance to

rule on the merits. *Achtien v. Dowd* (7th Cir. 1941), 117 Fed. (2d) 989. See: *Ex parte Elmer Davis* (1942), 318 U.S. 412.

C. Even if the California Supreme Court had reached the merits and denied the appellant's petition for habeas corpus on the ground that too much time has elapsed, the appellant would have still not exhausted his state remedies since he had a remedy at one time under the law of California and failed to avail himself of it.

It is our position that the validity of California's time limitation is not in issue in this case. As pointed out above, the California Court could not have reached the merits in view of the procedural inadequacy of Woollomes' petition. But assuming, for the purposes of argument, that the denial by the California Supreme Court of Woollomes' petition for habeas corpus was a ruling on the merits, namely, that too much time has elapsed with the appellant failing to seek the remedy provided by the State of California, it is our position that Woollomes has still not exhausted his State remedies.

Assuming that the California Supreme Court reached the merits, this is the case. Woollomes was convicted and imprisoned in violation of his constitutional rights.* California recognizes the constitutional right which was denied to Woollomes and will allow him to collaterally attack his conviction by habeas corpus (*In re Mooney,* 10 Cal. (2d) 1, 73 Pac.

*Any discussion over the question of exhaustion of state remedies of course always involves the presupposition that the judgment of conviction was obtained in violation of the petitioner's constitutional rights. That assumption is also implicit in this argument.

(2d) 554). Woollomes could have attacked his conviction but California imposes a time limitation and this time limitation has expired. Since Woollomes failed to avail himself of the corrective process available in the State of California he failed to exhaust his State remedy. The only question then will be whether there is any valid excuse for Woollomes' failure to avail himself of California corrective process—that is, whether there are any "exceptional circumstances" which will justify the Federal Court in entertaining the petition even though he has not "exhausted his State remedy".

Whether or not this proposition is correct depends on the determination of what precisely is meant by "exhaustion" of State remedies. If it means the "exhaustion" of only those remedies which are *now* available under the law of the State then the proposition is incorrect since because of the California time limitation Woollomes cannot now present his claim. But if it means, as we contend, the "exhaustion" of all those remedies which were ever available even though they may now be unavailable due to statutory or judicial limitation, then the proposition is correct and Woollomes by allowing his claim to grown stale has failed to exhaust his State remedy.

To illustrate our position assume that a person is convicted in a State Court in violation of his constitutional rights and with full knowledge of all the facts fails to take an appeal. Subsequently the State Courts refuse to grant him collateral relief on the ground that he should have appealed and there is no

justifiable excuse for not appealing. The United States Supreme Court denies certiorari. Has he exhausted his State remedy? We claim he has not and that the only federal question will be whether there are any exceptional circumstances which will excuse his failure to avail himself of State corrective process.

There seems to be no direct authority on this question. It has been discussed in several law review articles. 61 Harvard Law Rev. 657; 34 Minn. Law Rev. 653. *Sunal v. Large* (1947), 332 U.S. 174 holding that a federal prisoner may not raise in habeas corpus questions which could have been raised on appeal seems to support our theory. *Ex parte Hawk* (1943), 321 U.S. 114, 116, 117, codified in 28 U.S.C. 2254 seems to indicate that exhaustion of State remedies means not only those remedies presently available to the petitioner but also all those which were ever available.

> "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after *all state remedies available, including all appellate remedies in the state courts and in this court by appeal* or writ of certiorari have been exhausted." (Emphasis ours.)

The only square expression on the question by the Supreme Cout of the United States appears in the dissent of Mr. Justice Reed in *Wade v. Mayo* (1947), 334 U.S. 672, 693-6. Although the issue was sidestepped by the majority Mr. Justice Reed takes the position unequivocably that when it is shown that a petitioner

failed to exhaust his State remedies without adequate excuse, even though such remedies may now be unavailable, a Federal Court should not intervene to correct error. He points out that fundamentally this is a question of waiver and cites examples of cases in which the right to assert constitutional questions has been waived. He also points out that there is no danger of injustice that will stem from such a doctrine since if there is some valid justification for the failure of the petitioner to avail himself of the State remedy that will be an "exceptional circumstance" and the Federal Courts can entertain the petition even though the State remedies were not exhausted.

The 9th Circuit seems to be in accord with the view of Mr. Justice Reed. In *Barton v. Smith* (9th Cir. 1947), 162 Fed. (2d) 330, 333, it was argued that the State time limit had elapsed and that the petitioner was thus barred from collaterally attacking his conviction in the State of Washington. The Court said:

> "It is putting a premium on neglect and inaction to permit a prisoner to sit idly by and lose his state remedies through lapse of time, and then apply for habeas corpus in a federal court. An inmate of a state prison can thus force jurisdiction on a federal court, by the simple expedient of sleeping on his right to seek the aid of the state Forum."

Applying these decisions to the case at bar it appears that if Woollomes failed to avail himself of the available State corrective process and is now

barred by the lapse of time, he did not exhaust his State remedy. If there are "exceptional circumstances" which would justify this failure they should have been set forth in the petition. Since no "exceptional circumstances" are alleged the inescapable conclusion is that Judge Carter correctly dismissed the petition.

II. IN ANY EVENT THE FEDERAL DISTRICT COURT PROPERLY DENIED THE PETITION BECAUSE THE PETITION DID NOT ALLEGE FACTS WHICH, IF TRUE, WOULD SHOW THAT THE APPELLANT HAD BEEN DENIED ANY RIGHT UNDER THE UNITED STATES CONSTITUTION.

If the petition does not allege facts which show the denial of a constitutional right it should be dismissed. *Walker v. Johnson* (1941), 312 U.S. 275.

Woollomes alleges that prior to the trial his attorney and his friends made every effort to locate witnesses to the crime. The police officials would not give out the names. Woollomes' friends were allowed to inspect the records in both the Police Department and the Coroner's office but they found only the names of those witnesses who had testified at the preliminary examination. But after the trial these friends again inspected the records and found a list of other witnesses who had not been called by the prosecution. These witnesses were interrogated and executed affidavits to the effect that Woollomes had not committed the crimes. The jurors then by affidavit stated that if this testimony had been presented they would have voted for an acquittal.

These are the facts which Woollomes alleges constitute a denial of due process of law. He relies on *Mooney v. Holohan* (1935), 294 U.S. 103, and *Pyle v. Kansas* (1942), 317 U.S. 213. In both these cases the petitioner alleged that the sole basis of his conviction in the State Courts was perjured testimony which was knowingly used by the prosecuting authorities and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him. Such action by the prosecution is a deprivation of the constitutional requirement of due process. In *Mooney v. Holohan, supra,* the Court expressed the gist of the constitutional deprivation thus:

> "[Due process of law] cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through a pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

The Court concludes:

> "A contrivance by the state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." (P. 112.)

It is apparent that the essence of the deprivation is the "contrivance", by the State. Accordingly it is well settled that the fact that there may have been perjury or that new evidence may have been dis-

covered which would establish the prisoner's innocence is not sufficient unless there was active fraud by the prosecutor.

Tilghman v. Hunter (10th Cir. 1948), 167 Fed. (2d) 661;

Cobb v. Hunter (10th Cir. 1948), 167 Fed. (2d) 888;

Wild v. Oklahoma (10th Cir. 1951), 187 Fed. (2d) 409;

Kelly v. Ragen (7th Cir. 1942), 129 Fed. (2d) 811;

Hodge v. Huff (D.C. 1944), 140 Fed. (2d) 686.

In the light of these decisions consider the facts alleged in Woollomes' petition.

First, does the petition allege facts from which it could be inferred that the prosecution *knew* of this adverse evidence? The petition alleges that the prosecution refused to divulge the names of witnesses. The inference is that since a list of witnesses appeared in the records of the coroner's office after the trial the prosecution knew of these witnesses at the time of the trial. As far as it goes this may be a valid inference. But a reading of the affidavits themselves shows that the prosecution had no knowledge of the nature of the testimony that would be given by these witnesses. Of the seven witnesses, five were never even contacted by the prosecution. The prosecution could have had no knowledge of the unfavorable nature of the testimony of these witnesses. As to these witnesses the first necessary element is therefore manifestly lack-

ing—knowledge by the prosecuting authorities of the unfavorable nature of the testimony.

Secondly, does the petition allege facts from which it can be inferred that the prosecuting authorities *suppressed* this testimony? Two of the witnesses allege in their affidavits that they were interrogated by the police and that they were not able to identify Woollomes as a participant in the crime. These witnesses were not called by the prosecution and the prosecution did not give their names to the defense. Is this *suppression?* We submit that it is not. Suppression implies fraudulent concealment and intimidation. The prosecution in no way attempted to conceal the evidence. There was no attempt to mislead the defense. The prosecution apparently was quite frank with the defense and told them that it was not their policy to disclose the names of witnesses. If the defense had difficulty locating witnesses they could have easily secured a continuance for that purpose. Two of the witnesses whose names were allegedly withheld by the prosecution were members of the band which had been playing at the cafe on the night of the robbery. It should have been relatively simple to discover their names without any help from the police. The due process clause nullifies convictions secured through fraudulent deception practiced by the prosecuting authorities. That is the holding of the *Mooney* and *Pyle* cases. But the due process clause can not be used to nullify a conviction when the prosecution had all its cards on the table and where the sole basis for the collateral attack is, in reality, nothing more than newly discovered evidence.

It should be noted that the defense moved for a new trial on the ground of newly discovered evidence. That newly discovered evidence was substantially the same as that which is made the basis of the present collateral attack. The trial judge considered the evidence and denied the motion. The denial was affirmed by the California Supreme Court. *People v. Lariscy,* 14 Cal. (2d) 30, 33.

"Perjured testimony knowingly used" and "knowing suppression of unfavorable testimony" are not words of art which automatically entitle a petitioner in habeas corpus to a hearing on the merits. They are conclusionary allegations and must be supported by facts. Woollomes' petition clearly does not make out such a case and was, therefore, properly dismissed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the dismissal of the petition by the Federal District Court should be affirmed.

Dated, San Francisco, California,
May 23, 1952.

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